Although it may be difficult to square with strict rules of logic the prevailing theory of double jeopardy, and although legal technicalities are required to explain some of its operations,[1] yet it is to be remembered that the basis of the theory is not the doctrine of *res judicata*, but the protection of the individual from harassing prosecutions. The double jeopardy of the Constitution is in the main the double jeopardy of the common law at the time of the adoption of that instrument, and seems to bear the construction given it by the majority opinion. Perhaps we have outgrown the necessity of such protection as it gives against the prosecuting officers; but except where there have been statutory changes in states whose constitutions admit of them,[2] the prosecution cannot appeal, and an appeal by the prisoner is dependent upon a waiver.[3]

Whether a waiver of a constitutional or common law right is to be allowed should depend upon the purpose of that right and upon principles of public policy. Thus, while courts often refuse to permit a waiver of fundamental rights in which the public has an interest as essential for the protection of life and the proper conduct of trials, yet where the waiver results in nothing but benefit to the accused it is often allowed.[4] Because a waiver, in capital cases, of jury trial,[5] or of the legal number of jurors,[6] or of presence at the trial,[7] might result in capital punishment at the instance of an incompetent tribunal, it is forbidden. But, on the other hand, an accused may waive his right not to testify against himself, or the right of being confronted with witnesses,[8] or the right to a copy of the indictment,[9] all of which are intimately connected with due process of law. Since a waiver of double jeopardy in case of conviction cannot injure the accused and may be for his great advantage in securing a proper trial and perhaps acquittal, no reason arising from public policy or from the purpose of the privilege would seem to forbid its exercise.

THE DESIRABILITY OF A SINGLE COURT OF PATENT APPEALS. — To relieve congestion in federal litigation, the circuit courts of appeal were established, and, subject only to the power of review on *certiorari* by the Supreme Court, were given final jurisdiction in patent cases. The creation of nine appellate courts, with no common superior as to patent cases, naturally resulted in a conflict of decisions upon questions regarding the same patent. Thus the seventh circuit refused to adopt a decision of the eighth circuit upholding the validity of a patent;[1] and on *certiorari* the Supreme Court declared that no obligation rests on one circuit to follow an adjudication in another.[2] Consequently, a circuit court of New York, in a recent suit for infringement, when confronted with a decision of

---

[1] See Mixon *v.* State, 55 Ala. 129.
[2] See State *v.* Lee, 65 Conn. 265.
[3] United States *v.* Sanges, 144 U. S. 310.
[4] 6 Crim. L. Mag. 182.
[5] Harris *v.* People, 128 Ill. 585.
[6] Thompson *v.* Utah, 170 U. S. 343, 353.
[7] Hopt *v.* Utah, 110 U. S. 574.
[8] Shular *v.* State, 105 Ind. 289, 298.
[9] Lisle *v.* State, 6 Mo. 426.

[1] See Mast, Foos & Co. *v.* Dempster Mill Mfg. Co., 82 Fed. Rep. 327; Stover Mfg. Co. *v.* Mast, Foos & Co., 89 Fed. Rep. 333.
[2] Mast, Foos & Co. *v.* Stover Mfg. Co., 177 U. S. 485.

the Circuit Court of Appeals for the seventh circuit, and a later contrary decision, on the same facts, by the Circuit Court of Appeals for the second circuit, followed the Court of Appeals of its own circuit.[3] *Eldred* v. *Breitwieser*, 132 Fed. Rep. 251. The result is that a patent which gives rise to rights and liabilities in Connecticut, New York, and Vermont may in Illinois, Indiana, and Wisconsin be a mere nullity.

The only relief for this anomalous condition, at present, lies in review, upon *certiorari* or certification, by the Supreme Court. Although a circuit court of appeals may certify its inability to decide an issue, the mere existence of contrary views in different circuits is not of itself sufficient ground for submission of a question to the Supreme Court.[4] That some remedy is needed is evident. The government, by conferring letters patent, grants exclusive enjoyment in one piece of property throughout the jurisdiction of the United States. The construction of this grant, which is matter for the courts, should be co-extensive with the right which it purports to confer. The patentee, on the one hand, is entitled to complete protection, if he has justly been given a public grant. A patent, on the other hand, "in a broad sense deals with and determines the rights of the public;"[5] if invalid, the public should have its invalidity recognized throughout the United States. Patent rights rest upon grounds of policy which ought not to be defeated by ineffective patent jurisdiction.

The remedy of *certiorari* to the Supreme Court is inadequate, for the duration of a patent is too short to justify submission to the slow process of suits through circuit courts of appeal and the Supreme Court. To secure prompt unanimity of decision upon the same patent as well as uniformity of principles guiding patent adjudication, the American Bar Association has cogently argued that the present jurisdiction of the nine circuit courts of appeal should be lodged in one court.[6] It may be objected that such a plan will create a "class court," and that judges, confined to patent cases, will become too technical in the application of the law. But patent law is *sui generis*, and should be administered by judges specially fitted for the work. The danger of undesirable technicality in adjudication is obviated by the plan of the Bar Association, which provides for only one permanent justice assisted by circuit judges appointed for the term of six years.

LIMITATIONS OF THE DOCTRINE OF CONSTRUCTIVE NOTICE BY POSSESSION. — The theory upon which courts proceed in holding possession to be constructive notice of whatever rights the occupant may have in the premises is that possession, being *prima facie* evidence of some interest in the land by the tenant, should normally place a purchaser upon his guard and lead him to investigate the extent and nature of such interest. Any failure on his part to make inquiry is, therefore, regarded as an exhibition of negligence or bad faith which ought to place him in no better position than that of a purchaser with full knowledge of the adverse claim.[1] In some juris-

---

[3] But see Pelze *v.* Geise, 87 Fed Rep. 869.

[4] Columbia Watch Co. *v.* Robbins, 148 U. S. 266.

[5] Jenkins, J., in Electric Mfg. Co. *v.* Edison, etc., Light Co., 61 Fed. Rep. 834, 837.

[6] See Report of Committee on Patent, Trade-mark, and Copyright Law, 26 Reports of Am. Bar Ass. 460 (1903).

[1] Rublee *v.* Mead, 2 Vt. 544.